DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, GALVESTON DISTRICT
2000 FORT POINT ROAD
GALVESTON, TEXAS 77550

CESWG-RD-C 19 November 2024

MEMORANDUM FOR RECORD

SUBJECT: US Army Corps of Engineers (Corps) Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023) ,[1] SWG-2023-00037.

BACKGROUND. An Approved Jurisdictional Determination (AJD) is a Corps document stating the presence or absence of waters of the United States on a parcel or a written statement and map identifying the limits of waters of the United States on a parcel. AJDs are clearly designated appealable actions and will include a basis of JD with the document.[2] AJDs are case-specific and are typically made in response to a request. AJDs are valid for a period of five years unless new information warrants revision of the determination before the expiration date or a District Engineer has identified, after public notice and comment, that specific geographic areas with rapidly changing environmental conditions merit re-verification on a more frequent basis.[3] For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),[4] the Clean Water Act (CWA) implementing regulations published by the Department of the Army in 1986 and amended in 1993 (references 2.a. and 2.b. respectively), the 2008 *Rapanos-Carabell* guidance (reference 2.c.), and other applicable guidance, relevant case law and longstanding practice, (collectively the pre-2015 regulatory regime), and the *Sackett* decision (reference 2.d.) in evaluating jurisdiction.

This Memorandum for Record (MFR) constitutes the basis of jurisdiction for a Corps AJD as defined in 33 CFR §331.2. The features addressed in this AJD were evaluated consistent with the definition of “waters of the United States” found in the pre-2015 regulatory regime and consistent with the Supreme Court's decision in *Sackett*. This AJD did not rely on the 2023 “Revised Definition of ‘Waters of the United States,’” as amended on 8 September 2023 (Amended 2023 Rule) because, as of the date of this decision, the Amended 2023 Rule is not applicable in Texas due to litigation.

1. SUMMARY OF CONCLUSIONS.

[1] While the Supreme Court’s decision in *Sackett* had no effect on some categories of waters covered under the CWA, and no effect on any waters covered under RHA, all categories are included in this Memorandum for Record for efficiency.
[2] 33 CFR 331.2.
[3] Regulatory Guidance Letter 05-02.
[4] USACE has authority under both Section 9 and Section 10 of the Rivers and Harbors Act of 1899 but for convenience, in this MFR, jurisdiction under RHA will be referred to as Section 10.

a. Provide a list of each individual feature within the review area and the jurisdictional status of each one (i.e., identify whether each feature is/is not a water of the United States and/or a navigable water of the United States).

i. Pond A; 0.23 acre, (30.02958213, -95.72099575), Non-adjacent, Non-jurisdictional
ii. Pond B; 0.71 acre, (30.04078322, -95.71587023), Non-adjacent, Non-jurisdictional
iii. Pond C; 1.02 acre, (30.03740126, -95.71232665), Non-adjacent, Non-jurisdictional
iv. Wetland A; 4.23 acres, (30.04076522, -95.715208560), Non-adjacent, Non-jurisdictional
v. Wetland B; 0.21 acre, (30.03742698, -95.71287425), Non-adjacent, Non-jurisdictional
vi. Wetland C; 0.95 acre, (30.03716976, -95.71199212), Non-adjacent, Non-jurisdictional
vii. Wetland D; 0.51 acre, (30.0371095, -95.71392282), Non-adjacent, Non-jurisdictional
viii. Man-Made Ditch A; 3,389 linear feet, (30.02953853, -95.72193679), Non-jurisdictional
ix. Stream A; 255 linear feet, (30.02983595, -95.72264143), jurisdictional

2. REFERENCES.

a. Final Rule for Regulatory Programs of the Corps of Engineers, 51 FR 41206 (November 13, 1986).

b. Clean Water Act Regulatory Programs, 58 FR 45008 (August 25, 1993).

c. U.S. EPA & U.S. Army Corps of Engineers, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States* (December 2, 2008)

d. *Sackett v. EPA*, 598 U.S., 143 S. Ct. 1322 (2023)

e. 1980s preamble language (including regarding waters and features that are generally non-jurisdictional) (51 FR 41217 (November 13, 1986) and 53 FR 20765 (June 6, 1988))

3. REVIEW AREA. The project area is a 250-acres tract located east of Mueschke Road and south of Juergen Road in Cypress, Harris County, Texas (Map enclosed). The center coordinates of the site are 30.03432 N, -95.71763 W

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Cypress Creek

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. Stream A flows 0.56 miles south to Little Cypress Creek, an RPW that flows 7.29 miles southeast into Cypress Creek, a RPW at this point which flows 41 miles to the navigable portion of Cypress Creek.

6. SECTION 10 JURISDICTIONAL WATERS[5]: Describe aquatic resources or other features within the review area determined to be jurisdictional in accordance with Section 10 of the Rivers and Harbors Act of 1899. Include the size of each aquatic resource or other feature within the review area and how it was determined to be jurisdictional in accordance with Section 10.[6] N/A

7. SECTION 404 JURISDICTIONAL WATERS: Describe the aquatic resources within the review area that were found to meet the definition of waters of the United States in accordance with the pre-2015 regulatory regime and consistent with the Supreme Court's decision in *Sackett*. List each aquatic resource separately, by name, consistent with the naming convention used in section 1, above. Include a rationale for each aquatic resource, supporting that the aquatic resource meets the relevant category of "waters of the United States" in the pre-2015 regulatory regime. The rationale should also include a written description of, or reference to a map in the administrative record that shows, the lateral limits of jurisdiction for each aquatic resource, including how that limit was determined, and incorporate relevant references used. Include the size of each aquatic resource in acres or linear feet and attach and reference related figures as needed.

[5] 33 CFR 329.9(a) A waterbody which was navigable in its natural or improved state, or which was susceptible of reasonable improvement (as discussed in § 329.8(b) of this part) retains its character as "navigable in law" even though it is not presently used for commerce, or is presently incapable of such use because of changed conditions or the presence of obstructions.
[6] This MFR is not to be used to make a report of findings to support a determination that the water is a navigable water of the United States. The district must follow the procedures outlined in 33 CFR part 329.14 to make a determination that water is a navigable water of the United States subject to Section 10 of the RHA.

a. TNWs (a)(1): N/A

b. Interstate Waters (a)(2): N/A

c. Other Waters (a)(3): N/A

d. Impoundments (a)(4): N/A

e. Tributaries (a)(5): Stream A, 255 linear feet, (30.02983595, -95.72264143) is an unnamed tributary that flows south 0.56 miles to Little Cypress Creek, an RPW, which then flows 7.29 miles southeast to Cypress Creek, a RPW and TNW. Stream A holds a relatively permanent flow, with multiple Google Earth aerials indicating standing water in the creek during drier than normal conditions. Therefore, it is a relatively permanent water subject to Section 404 of the Clean Water Act.

f. The territorial seas (a)(6): N/A

g. Adjacent wetlands (a)(7): N/A

8. NON-JURISDICTIONAL AQUATIC RESOURCES AND FEATURES

a. Describe aquatic resources and other features within the review area identified as "generally non-jurisdictional" in the preamble to the 1986 regulations (referred to as "preamble waters").[7] Include size of the aquatic resource or feature within the review area and describe how it was determined to be non-jurisdictional under the CWA as a preamble water.

Pond A (0.23 acre) is a man-made pond excavated out of uplands for the purpose of stock watering. The man-made pond appears to have been excavated from uplands sometime between 1978 and 1989 depicted via Google Earth images. The 1986 preamble to 33 CFR 320-330 regulations states that for clarification it should be noted that we generally do not consider the following waters to be "waters of the United States…(C) artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, setline basins, or rice growing. Therefore, Pond A is not a water of the United States and is not subject to Section 404 of the Clean Water Act.

[7] 51 FR 41217, November 13, 1986.

b. Describe aquatic resources and features within the review area identified as "generally not jurisdictional" in the *Rapanos* guidance. Include size of the aquatic resource or feature within the review area and describe how it was determined to be non-jurisdictional under the CWA based on the criteria listed in the guidance. The 1986 regulations preamble describes ditches as generally not considered Waters of the United States if they are "non-tidal drainage and irrigation ditches excavated on dry land".

   Ditch A (3,389 LF) is non-tidal and does not drain wetlands. The report states that the ditch has an ordinary high water mark; however, it does not carry relatively permanent flow. Therefore, Ditch A is not a water of the United States and is not subject to Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act.

c. Describe aquatic resources and features identified within the review area as waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA. Include the size of the waste treatment system within the review area and describe how it was determined to be a waste treatment system. N/A

d. Describe aquatic resources and features within the review area determined to be prior converted cropland in accordance with the 1993 regulations (reference 2.b.). Include the size of the aquatic resource or feature within the review area and describe how it was determined to be prior converted cropland. N/A

e. Describe aquatic resources (i.e. lakes and ponds) within the review area, which do not have a nexus to interstate or foreign commerce, and prior to the January 2001 Supreme Court decision in "*SWANCC*," would have been jurisdictional based solely on the "Migratory Bird Rule." Include the size of the aquatic resource or feature, and how it was determined to be an "isolated water" in accordance with *SWANCC*. N/A

f. Describe aquatic resources and features within the review area that were determined to be non-jurisdictional because they do not meet one or more categories of waters of the United States under the pre-2015 regulatory regime consistent with the Supreme Court's decision in *Sackett* (e.g., tributaries that are non-relatively permanent waters; non-tidal wetlands that do not have a continuous surface connection to a jurisdictional water).

   Based on the desk review, Ponds B and C were dug from wetlands; therefore, we are treating them as wetlands. Wet A (4.23 acres) is abutting Pond B (0.71 acre) and appears to have a continuous surface water connection via a swale

that flows 1,617 feet to the west and south outside of the project area and connect to a ditch flowing south 852 feet to the man-made ditch (A) located within the property area which flows 3,633 feet west and south within the project area to Stream A, a RPW. The swale is faintly seen on aerial photos and LiDAR imagery. Swales are not jurisdictional. The swale does not appear to contain an ordinary high water mark and/or bed and bank. Furthermore, the ditch does have an ordinary high water mark; however, it does not carry permanent flow; therefore, it is not a tributary. The ditch flows south then converges into Stream A, a relatively permanent water. The total distance from Wet A and Pond B is 1.16 miles (6,102 feet) to the RPW. Although the swale and ditch are not relatively permanent waters, they may serve as a physical connection that maintains a continuous surface connection between an adjacent wetland and a relatively permanent water, Stream A. Non-relatively permanent ditches, other non-relatively permanent channels, and culverts are features that can serve as all or part of a continuous surface connection depending on the factual context, because these features often have physical indicators of flow (e.g., bed and bank and other indicators of an ordinary high water mark) that provide evidence that the features physically connect wetlands to jurisdictional waters, including during storm events, bank full periods, and/or ordinary high flows. Depending on the factual context, including length of the connection and physical indicators of flow, more than one such feature can serve as part of a continuous surface connection where they together provide an unimpaired, continuous physical connection to a jurisdictional water as explained in Regulatory Guidance Memorandum on SWG-2023-00284 and NAP-2023-01223. However, the approximate distance for the flow path to the relatively permanent water, Stream A is 1.16 miles. This distance is too far to be considered a continuous surface connection. As stated in Regulatory Guidance Memo NWK-2022-00809, weak indicators of flow frequency (e.g. bed and bank and other indicators of a OHWM) and duration as well as long distances and chain of features between the wetlands and the relatively permanent water can be too extended and tenuous to constitute a continuous surface connection. Considering these factors together, and consistent with Sackett, the series of non-relatively permanent features, and the length do not meet the continuous surface connection requirement for Wet A and Pond B. Therefore, Wet A and Pond B do not meet the definition of adjacent as defined in the pre-2015 regime post Sackett guidance and are not waters of the United States subject to Section 404 of the Clean Water Act.

Wet B (0.21 acre) and Wet C (0.95 acre) abut Pond C (1.02 acre). Wet D (0.51 acre) is located to the west of these aquatic features; however, it is not connected and/or abutting Wet B, Wet C, and Pond C. All four of these aquatic features do not appear to have any known continuous surface connection to Stream A, a RPW, within the project area or any other RPW or TNW offsite.

Based on the desk review and data resources listed in #9, there are no elevation signatures to indicate a swale, erosional feature, ditch, or culvert that would potentially serve as surface connections to Stream A or Little Cypress Creek. These aquatic features are located approximately 1 mile from Stream A. No more than overland sheet flow would exit the wetlands. Therefore, these aquatic resources do not meet the definition of adjacent as defined in the pre-2015 regime post Sackett guidance and are not waters of the United States subject to Section 404 of the Clean Water Act.

9. DATA SOURCES. List sources of data/information used in making determination. Include titles and dates of sources used and ensure that information referenced is available in the administrative record.

   a. Desk Review; 9 January 2024

   b. Maps, plans, plots or plat submitted by or on behalf of the applicant/consultant; [redacted] submitted on 12 October 2022

   c. U.S. Geological Survey map(s); 2019 Rose Hill, Texas Quadrangle

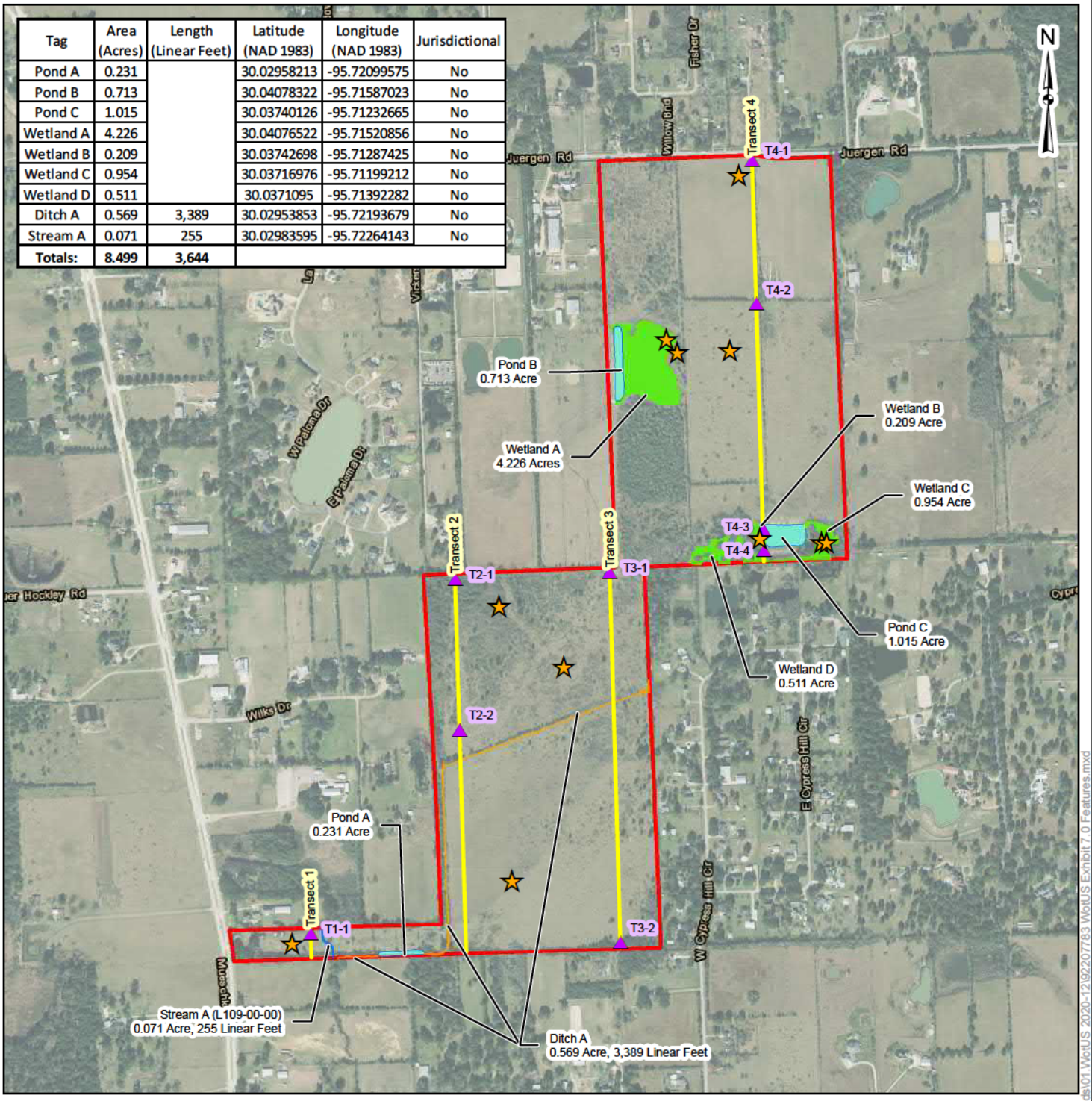
   d. USDA Natural Resources Conservation Service Soil Survey; Accessed 9 February 2024

   e. National Wetlands Inventory map(s); Accessed 9 February 2024

10. OTHER SUPPORTING INFORMATION. EPA Headquarters and Office of the Assistance Secretary (Civil Works) Memorandum on SWG-2023-00284, NAP-2023-01223, and NWK-2022-00809.

11. NOTE: The structure and format of this MFR were developed in coordination with the EPA and Department of the Army. The MFR's structure and format may be subject to future modification or may be rescinded as needed to implement additional guidance from the agencies; however, the approved jurisdictional determination described herein is a final agency action.

Tag	Area (Acres)	Length (Linear Feet)	Latitude (NAD 1983)	Longitude (NAD 1983)	Jurisdictional
Pond A	0.231		30.02958213	-95.72099575	No
Pond B	0.713		30.04078322	-95.71587023	No
Pond C	1.015		30.03740126	-95.71232665	No
Wetland A	4.226		30.04076522	-95.71520856	No
Wetland B	0.209		30.03742698	-95.71287425	No
Wetland C	0.954		30.03716976	-95.71199212	No
Wetland D	0.511		30.0371095	-95.71392282	No
Ditch A	0.569	3,389	30.02953853	-95.72193679	No
Stream A	0.071	255	30.02983595	-95.72264143	No
Totals:	**8.499**	**3,644**			



Project Limits, 204.743 Acres
Transect Point
Transect Line
Sample Point
Stream
Pond
Wetland
Drainage Feature

0 500 1,000 2,000 Feet

DATA SOURCES:
Esri, HERE, Garmin, (c) OpenStreetMap contributors
USDAUnited States Department of Agriculture (USDA).
Texas NAIP Imagery, 2018-12-31

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[redacted]

[redacted]

Features Map

Waters of the U.S. Assessment
Tomball ISD Greenfield Site
East of Mueschke Road, South of Juergen Road
Cypress, Harris County, Texas

Exhibit

7.0